BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY BUTTERFIELD	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,021,808
L & K CONSTRUCTION[1]	)	
Respondent	)	
AND	)	
	)	
NATIONWIDE MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the December 15, 2011 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on April 3, 2012.

APPEARANCES

James B. Biggs, of Topeka, Kansas, appeared for the claimant. John F. Carpinelli, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ denied claimant compensation finding that he failed to sustain his burden of proof that he suffered personal injury by accident, arising out of and in the course of his employment with respondent, and failed to sustain his burden of proof that his current inability to work was on account of the alleged February 5, 2004 injury. The ALJ also opined that since respondent and its insurance carrier paid medical expenses of

[1] P.H. Trans. (Jul. 7, 2005) at 5. It is stipulated that L&K is a corporation.

$18,112.34, and the claim is not compensable, they may submit the excess medical expenses to the Director for determination of whether and to what extent reimbursement from the Workers Compensation Fund is appropriate.

Claimant argues that the Board should reverse the ALJ and find that he has met his burden of proving that his injury, of February 5, 2004, arose out of and in the course of his employment. Claimant argues that ice and snow removal is a job task of Larry Butterfield dba L & K Construction. Claimant argues that there was an implied agreement for the exchange of services between Larry Butterfield dba L & K Construction[2] and his neighbor, Mr. Meier. Claimant contends that his average weekly wage while working for Larry Butterfield dba L & K Construction would be sufficient to qualify for the statutory maximum permanent partial disability that existed on the date of the injury, as evidenced by Ex. 1 and 2 of the regular hearing. Claimant also argues that the Social Security disability offset does not apply as there is no duplication of benefits. Finally, claimant argues that he is entitled to a 25 percent functional impairment as opined by Dr. Fluter, or in the alternative a 20 percent functional impairment as opined by Dr. Koprivica.

Respondent argues that the ALJ's Award should be affirmed. Respondent contends that the activity involving the shoveling of snow from his neighbor's drive was the result of a personal arrangement between claimant and Mr. Meier. Therefore, any injury suffered while cleaning the snow from Mr. Meier's drive did not arise out of and in the course of his employment with respondent. Respondent further argues that claimant contradicted himself when he described the snow removal as a "favor"[3], a "responsibility"[4], and something for which he had been "hired"[5].

ISSUES:

1. Did claimant's injury, on February 5, 2004, arise out of and in the course of his employment with respondent?;

2. Whether claimant sustained an additional intervening accident subsequent to the alleged injury, of February 5, 2004, which would extend the claimant's disability;

3. Claimant's average weekly wage; and

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[2] As noted earlier, L & K, though referred to in various legal capacities throughout this litigation, is actually a corporation.

[3] P.H. Trans. (Jul. 7, 2005), Resp. Ex. A at 3 (Cl. Depo. May 6, 2005 at 10).

[4] P.H. Trans. (Jul. 7, 2005), Resp. Ex. A at 3 (Cl. Depo. May 6, 2005 at 10).

[5] P.H. Trans. (Jul. 7, 2005), Resp. Ex. C at 5 (Cl. Recorded Statement on July 14, 2004 at 3).

4. Whether K.S.A. 44-501(h) provides a social security retirement benefits offset.

FINDINGS OF FACT

Claimant has been the owner of L & K Construction with his wife, for over 30 years and is its only employee. He testified that the company, which claimant described as a corporation, performs backhoe and trenching work. Claimant also owns Butterfield's Buffalo Company, which raises buffalo. Claimant owns 24 cattle and buys and sells as needed. He is not involved in the care of the cattle.

L & K Construction and Butterfield's Buffalo Company had Allied Insurance through Cushing Insurance. The two companies shared one set of financial books.

Claimant testified that L & K Construction has been cleaning driveways since 1997. The company also does work for the water districts; trenching, installing and repairing water lines. Part of the work for the water districts involves snow removal at the sites where the work is to be done.

Claimant and his neighbor of 18 years, Mike Meier, have an arrangement where Mr. Meier mows the lawn where L & K Construction is located, in exchange for work that Mr. Meier might need done on his property. This included, but was not limited to backhoe work, trenching work and snow removal.[6] Claimant testified that Mr. Meier does more for him by mowing the lawn as needed or at least once a week, than he does for Mr. Meier.

Claimant testified that L & K Construction still does snow removal, but doesn't advertise that service. He testified to clearing one or two driveways every winter, not necessarily including his or Mr. Meier's. Claimant takes care of the Meier driveway because his brother used to own the property. When his brother passed away, the Meier's bought the property, and he felt obligated to continue to clear snow from Mr. Meier's driveway. And Mr. Meier agreed to mow the grass on L & K's property. Mr. Meier was not obligated to and did not always mow the grass at L & K. Claimant testified that if Mr. Meier did not mow the grass, the company would pay someone to do it.

Claimant testified that on February 5, 2004, he had a slip and fall accident while removing snow from Mr. Meier's driveway. After the slip and fall, claimant sought medical treatment with his family physician, Dr. Drake. X-rays were taken but displayed no fractures. Claimant does have pre-existing degenerative disc disease in the lumbar spine. Claimant was diagnosed with coccydynia and prescribed anti-inflammatory medications and physical therapy. Physical therapy notes from July 16, 2004, indicate a significant reduction in claimant's pain. Claimant reported that he had returned to his normal work duties without pain and even skipped his last treatment due to the reduction in his pain

[6] P.H. Trans. (Jul. 7, 2005) at 15.

level. However, despite receiving treatment and reporting the improvement, at the preliminary hearing on July 7, 2005, claimant reported that he was still experiencing symptoms in his low back, both legs and neck.[7] Claimant's duties with L & K included running a backhoe and a trencher, digging trenches and holes, connecting and repairing water lines and crawling into and out of holes and ditches. Claimant regularly lifted weights up to 40 pounds.

Claimant testified that he had workers compensation insurance at the time of the accident, and that it was his understanding when he purchased the policy he would be covered under the policy for any work he performed for L & K Construction and Butterfield Buffalo Company.[8]

When claimant filed his application for hearing, he listed that his injuries from the slip and fall were to his back, left lower extremity, right lower extremity and all related symptoms or systems. There was no mention of his neck or right shoulder. Claimant testified that he is not sure why that is because they were injured in the accident. Claimant testified that he was under the impression that the injury listed to his back included the neck, shoulder and low back.[9]

Claimant next sought medical treatment with Steven L. Hendler, M.D., on September 20, 2004. Claimant complained of initial pain from the fall including pain in his low back, legs and feet. Claimant developed pain in his neck and right shoulder a couple of months after the fall.[10] Dr. Hendler's report of September 20, 2004, indicates claimant received a benefit from the physical therapy, but, contrary to the physical therapy records, that benefit was only partial as he continued with pain just left of the sacrum. Dr. Hendler diagnosed a lumbar strain and recommended an MRI of the lumbar spine. He also noted that claimant's gait pattern was more consistent with knee problems, including likely degenerative joint disease, rather than problems identified with the back.

Claimant returned to Dr. Hendler on October 4, 2004. He was again diagnosed with lumbar strain along with degenerative joint and disk disease with central and foraminal stenosis. Dr. Hendler recommended epidural steroid injections, which claimant declined. Claimant was returned to his regular work duties and determined to be at maximum medical improvement. Dr. Hendler determined that, as claimant had rejected the epidural injection treatment, he had nothing further to offer claimant.

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[7] P.H. Trans. (Jul. 7, 2005) at 22.

[8] P.H. Trans. (Jul. 7, 2005) at 29.

[9] P.H. Trans. (Jul. 7, 2005) at 51.

[10] Medical Records Stipulation (Nov. 14, 2011).

On October 10, 2005, the ALJ ordered respondent and its insurance carrier to provide a list of three qualified physicians from which claimant was to designate a treating physician. Claimant ultimately chose John M. Ciccarelli, M.D., as the treating physician. For reasons unknown, it took claimant 15 months to select a treating physician. One was authorized by the ALJ, in January 2007. Claimant did not give a reason for the delay. Dr. Ciccarelli ordered a more recent MRI which displayed degenerative disc disease throughout the lumbar spine with central disc protrusions at L3-4 and L5-S1. There was no evidence of an acute bony injury. Dr. Ciccarelli opined that the degenerative disc disease pre-existed the February 5, 2004 fall. However, he also noted a symptomatic aggravation, based upon claimant's provided history. Epidural injections were again recommended and this time claimant agreed. Claimant was allowed to continue with his normal work duties. Dr. Ciccarelli also indicated the potential for decompressive type surgery to address claimant's multi-level stenosis which he could not say was solely related to the February 5, 2004 fall.

Claimant underwent lumbar epidural steroid injections beginning on February 27, 2007, with Joseph F. Galate, M.D. The first injections resulted in a 50 percent reduction in claimant's leg pain, but claimant still had problems with prolonged walking or standing. Claimant underwent additional injections on March 15, 2007, with a reported 80 percent improvement.

As of April 3, 2007, claimant indicated no need to proceed to a third injection. Dr. Ciccarelli agreed. However, on April 24, 2007, claimant returned after several days of regular work with mild radiculopathy. A third injection was then scheduled and administered on April 30, 2007. Claimant reported dramatic improvement of his radicular pain. He reported only intermittent aches and pains in his back. On May 15, 2007, claimant was returned to work at his ordinary duties with the caution that he use common sense with activities. Claimant was listed at MMI at that time. In his letter of November 7, 2007, Dr. Ciccarelli rated claimant at 3 percent permanent partial impairment of the body as a whole for the back pain and intermittent radiculopathy secondary to the fall. As noted in the Award, Dr. Ciccarelli makes no reference to which version, if any, of the AMA Guides he utilized in reaching this conclusion.

Claimant was referred, by his attorney, to anesthesiologist and pain management specialist George G. Fluter, M.D., on September 18, 2007. Dr. Fluter reviewed a multitude of medical documents, many of which are not contained in this record. Claimant's complaints at that time were pain in the low back, buttocks and lower extremities, numbness in his legs and feet and weakness in the lower back and legs. Standing and walking make the pain worse, lying down and sitting make the pain better. Based upon his examination, Dr. Fluter diagnosed low back and bilateral leg pain, multilevel lumbar spondylosis, spinal stenosis and neurogenic claudication. He then determined that there is a causal/contributory relationship between claimant's current condition and the February 5, 2004 incident.

Dr. Fluter rated claimant at a 25 percent permanent partial impairment to the whole body, pursuant to the AMA Guides, 4th ed.[11] Restrictions were imposed of lifting, carrying, pushing and pulling up to 20 pounds occasionally, 10 pounds frequently; bending, stooping, and twisting were restricted to an occasional basis, squatting, kneeling, crawling and climbing were restricted to an occasional basis; and claimant was to avoid prolonged sitting, standing, and walking. Also allowance should be made to alternate these activities and change position periodically for comfort. It was suggested that claimant consider spinal decompression surgery. As noted in the Award, there is no suggestion in this record that claimant ever observed Dr. Fluter's restrictions.

Claimant was referred by respondent to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., on January 17, 2008. Claimant reported that the earlier provided physical therapy and anti-inflammatory medications were not helpful. He also reported that the epidural injections administered by Dr. Galate under the instruction of Dr. Ciccarelli, provided only temporary response and this from only one of the injections. Claimant's chief complaint was of low back pain with fatigue as a primary aggravating factor. Claimant was diagnosed with chronic low back pain and intermittent bilateral sciatica and showed signs of some underlying degenerative changes creating some issues with spinal stenosis. This was not considered to be specifically caused by the February 5, 2004, incident at work. Claimant was assigned a 5 percent whole person impairment for the February 2004 incident, pursuant to the AMA Guides, 4th ed. No work restrictions were assigned as claimant continued with his usual work.

Claimant met with Dr. Fluter again on February 11, 2009. His chief complaint was pain in the low back and lower extremities. Dr. Fluter opined that claimant was status post work-related injuries 2/5/04; low back and bilateral leg pain; multilevel lumbar spondylosis and spinal stenosis; and neurogenic claudication based on historical features. Dr. Fluter believed that claimant's current medical condition was causally related to the February 5, 2004 incident. But he did not believe that the degenerative changes affecting the lumbar spine were caused by the February 5, 2004 incident, but were aggravated.

Restrictions were imposed of restricting lifting, carrying, pushing and pulling up to 20 pounds occasionally, 10 pounds frequently; restricted bending, stooping, and twisting to an occasional basis; restricted squatting, kneeling, crawling and climbing to an occasional basis, and claimant was to avoid prolonged sitting, standing, and walking, and allowance should be made to alternate these activities and change position periodically for comfort. Dr. Fluter recommended that claimant continue with his use of medications to modulate his pain symptoms and ordered no additional treatment as long as claimant feels his condition is tolerable.

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[11] The Award mistakenly states the whole body rating is 20 percent.

Claimant was then referred, by his attorney, to board certified neurological surgeon Paul S. Stein, M.D., for an examination, on May 19, 2009. Claimant's chief complaint was of back and leg pain. Claimant was examined and diagnosed with severe degenerative disk disease, that preexisted the February 5, 2004 incident. The MRI scans from 2004 to 2007 did not display a great deal of difference. He opined that claimant's complaints, over the last several years, are related in a great part to the aggravation by the fall. Any new symptoms or progression would be related to the natural history of claimant's degenerative disease and not the work injury.

Claimant was returned to Dr. Ciccarelli, on December 18, 2009. The report of that date does not indicate that a follow-up examination occurred. But apparently the doctor spent a significant amount of time discussing claimant's condition with both claimant and his wife. A spinal cord stimulator was discussed as a treatment option, but Dr. Ciccarelli expressed concern that this would not provide any predictable relief. Claimant acknowledged that as long as he was not working, his low back and leg symptoms did not really bother him. Dr. Ciccarelli recommended that claimant consider doing something lighter, or even retire which might aid in his avoidance of potentially risky procedures like the stimulator, or even surgery. Dr. Ciccarelli continued to be of the opinion that clamant's ongoing symptoms were the result of claimant's ongoing multi-level degenerative condition and stenosis, rather than being issues from the February 5, 2004 accident.

Claimant was next evaluated, at his attorney's request, by board certified emergency medicine specialist P. Brent Koprivica, M.D., on May 18, 2010. The doctor opined that the progression of claimant's lumbar impairment is the natural and probable consequence of his work injury of February 5, 2004, and the permanent aggravation to the lumbar spine is attributable to that injury. Dr. Koprivica opined that claimant suffered a permanent aggravating injury with the development of lumbar spinal stenosis based on permanent aggravation to lumbar spondylosis and stenosis as a direct and proximate result of the February 5, 2004 incident. Claimant was at maximum medical improvement, but remained in need of ongoing treatment.

Pursuant to the AMA Guides, 4th ed. Claimant was assigned a 20 percent whole person impairment. Claimant was restricted from lifting more than 10 pounds occasionally; no lifting from floor level; rarely[12] bend at the waist, push, pull or twist; with no squatting, kneeling or crawling; no standing or walking more than 15 minute; captive sitting was limited to one to two hours, and claimant was to avoid activities where jarring or whole body vibration would occur.

[12] Less than 5 percent of an 8 hour day.

Claimant's continues to complain of continuous pain in his back and both legs.[13] Claimant testified that there are times where he has been bedridden from the pain. Claimant testified that lifting, crawling out of holes and bending over are among the job duties that increase his pain. Claimant stopped working in January 2010, because he could no longer stand the pain. Prior to January 2010, claimant last performed work for L & K Construction, in October 2009. Claimant testified that the water district hired L & K Construction to do backhoe work and the company was considered a contractor rather than an employee.[14]

Claimant continues to keep L & K Construction in good standing as a corporation even though he is not working and has no employees. He testified that the company is for sale but has not had a good offer yet. Claimant continues to operate his other business, Butterfield's Buffalo Meat, where he sells buffalo meat. Claimant testified that he files a joint tax return for L & K Construction and Butterfield's Buffalo Meat.[15]

Claimant returned to Dr. Carabetta, on July 28, 2011. At that time, his chief complaint was of low back pain with the amount of pain depending on his activity level. Claimant reported his symptoms had worsened in last two years, despite being away from work. Claimant's was examined and diagnosed with lumbar degenerative disk disease and lumbar spinal stenosis. However, the diagnosis was not related to February 2004 incident, but rather represented the collective damage over many decades and years, both before and after the incident. He opined that claimant was not permanently totally disabled from the incident. The impairment was unchanged from previous visit, which was a 5 percent whole person impairment. This impairment was the result of a combination of claimant's injury, his prior years of heavy labor and the work claimant performed after the accident on February 5, 2004.

Claimant was again evaluated by Dr. Hendler, on September 20, 2011. Claimant had ceased working as of October 2010. Dr. Hendler determined that claimant's need for restrictions had not changed since 2004, but there were no restrictions from the February 5, 2004 accident.

Claimant testified that all of the doctors he has seen have told him that his physical condition would improve if he stopped working. Claimant's job was a very physical one. Claimant testified that the pain in his back is a 9 out 10. He got no permanent relief from his treatment of chiropractic treatment, physical therapy and injections. He did admit to a temporary relief of three months with the injections.

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[13] Claimant's Discovery Depo. (Jul. 22, 2010) at 6-7.

[14] Claimant's Discovery Depo. (Jul. 22, 2010) at 10.

[15] Claimant's Discovery Depo. (Jul. 22, 2010) at 18.

Respondent concedes there was an employer/employee relationship between L & K and claimant (Larry Butterfield). But on the flip side, contends there is no provable wage that actually went to him from the company.[16] Some of the money paid for the backhoe business was paid directly to the claimant. Claimant testified that he personally owned the equipment at L& K Construction, and when he sold some of it, he pocketed the proceeds.

Claimant obtained a workers compensation insurance policy from Cushing Insurance and it was his understanding that the policy was going to cover L & K Construction, Butterfield Buffalo Meats and Larry Butterfield Backhoe. He also testified that the income from these three companies came together into one pool, but separate tax returns were filed for each business.[17] Claimant did not report anything on his taxes showing a monetary value to L & K for the services provided by Mr. Meier.

Claimant was under the impression that when he filled out the application for workers compensation benefits coverage with his insurance agent he was going to be covered for everything. This is claimant's first workers compensation claim against any of his businesses. Claimant did not obtain another workers compensation policy after it expired. Claimant has not had workers compensation coverage since a year and a half after his accident.

Claimant was referred to vocational specialist Steven Benjamin for a job task evaluation on February 29, 2008. Mr. Benjamin found that claimant had performed 33 tasks in the 15 years preceding the accident. However, this record is void of any task loss opinion by a physician.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[18]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[19]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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[16] R.H. Trans. at 12.

[17] R.H. Trans. at 27.

[18] K.S.A. 44-501 and K.S.A. 44-508(g).

[19] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[20]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[21]

The injury in this matter occurred as claimant was shoveling snow from his neighbor's drive. Claimant attempted to make snow removal from driveways as part of his normal business. He failed to show a business purpose or legal or contractual requirement that he remove snow from his neighbor's drive. It was either a favor, an obligation from when his twin brother owned the property, or he was hired to do so, depending upon claimant's varying testimony. The Board finds that this activity was no more than claimant performing a personal favor for a friend and neighbor. The finding by the ALJ that claimant has failed to sustain his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Clamant has failed to prove by a preponderance of the credible evidence that he suffered personal injury by accident which arose out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated December 15, 2011, is affirmed.

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[20] K.S.A. 44-501(a).

[21] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
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